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Supreme Court of the United States

OCTOBER TERM, 1949.

NATIONAL MARITIME UNION OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, and JOSEPH CURRAN, JACK LAWRENSON, JOSH LAWRENCE, CHESTER YOUNG, HAROLD McCORMICK, MICHAEL McBRIDE, and CHARLES MONROE,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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NATIONAL MARITIME UNION OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND JOSEPH CURRAN, JACK LAWRENSON, JOSH LAWRENCE, CHESTER YOUNG, HAROLD MCCORMICK, MICHAEL MCBRIDE, AND CHARLES MONROE,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

NATIONAL MARITIME UNION OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS (hereinafter called the NMU or the Union), and JOSEPH CURRAN, JACK LAWRENSON, JOSH LAWRENCE, CHESTER YOUNG, HAROLD MCCORMICK, MICHAEL MCBRIDE, and CHARLES MONROE, pray that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the

decree of that court entered on August 5, 1949, enforcing an order (R. 963-969) of the National Labor Relations Board (hereinafter called the Board) dated August 17, 1948, under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sup. I, Sec. 141 *et seq.*).

In substance, the order enjoins the Union and its agents from demanding that certain employment provisions heretofore contained in collective bargaining agreements be included in future agreements.[1]

It is conceded that these provisions *per se* are not unlawful (R. 939). A novel question is therefore presented by the holding of the Board and the Court below that the possibility of potential discrimination under a valid contract provision and affecting unidentified individuals is sufficient to constitute a violation of Section 8 (b) (2) of the Act.

Opinions Below.

The opinion of the Court of Appeals (R. 937-946) is reported at 175 F. (2d) 686. The findings of fact, conclusions of law, and order of the Board (R. 1-43) are reported at 78 N. L. R. B. No. 137.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 5, 1949 (R. 969). The jurisdiction of this Court is invoked under Section 1254 of the Federal Judicial Code, as amended through June 15, 1949 (Title 28, U. S. Code, Judiciary and Judicial Procedure), and Section 10 (e) of

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[1] These provisions are more fully described at pp. 6-7, *infra*.

the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

Questions Presented.

1. Whether a labor organization can be charged with violating Section 8 (b) (2) of the Act by insisting upon a collective bargaining agreement which, if executed, *might* tend to disadvantage non-union members; absent a specific complaint of actual discrimination by a named employee or group of employees.

2. Whether a collective bargaining agreement, admittedly lawful on its face, may be deemed unlawful merely because certain of its provisions, as might be administered at a future date, may tend to discriminate against non-union members.

3. Whether a labor organization which has demonstrated a sincere intention to conclude an agreement, the terms of which are concededly valid, can nevertheless be found guilty of refusing to bargain within the meaning of Section 8 (b) (3) and Section 8 (d) of the Act.

4. Whether the stated objectives of the Act would be served if, in this case, the Board's order were to be enforced.

5. Whether the Board, by denying to petitioners the opportunity of submitting facts, arguments, and offers of settlement prior to the hearing and by refusing to grant petitioners a single adjournment, violated the Administrative Procedure Act and the due process clause of the Constitution of the United States.

6. Whether the Act, as construed and applied by the Board in the instant case, contravenes the First, Fifth, and Thirteenth Amendments to the Constitution of the United States.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act and its amendments, and of the Administrative Procedure Act are set forth in the appendix to petitioners' brief, *infra*.

Statement.

Upon amended charges filed by the Companies (R. 570-591), the Board ordered the cases consolidated and thereafter issued a complaint alleging, in substance, that the NMU and certain of its officers, by insisting upon a retention of existing employment practices, had refused to bargain with the Companies within the meaning of Section 8 (b) (3) and 8 (d) of the Act, and had attempted to cause the Companies to discriminate against persons because of their non-membership in the NMU within the meaning of Section 8 (b) (2) of the Act (R. 592-603).

A hearing upon the complaint was held before a Trial Examiner of the Board on June 14, 15, and 16, 1948 (R. 47). On June 21, 1948, the trial examiner issued his intermediate report. On August 17, 1948, the Board issued its decision and order (R. 1-43). Thereafter the Board filed with the Court below a petition to enforce its order (R. 921-932). On July 1, 1949, the Court issued its opinion, in which the Board's conclusions were unanimously sustained. Application by Petitioners for a rehearing was denied by the

Court below on July 25, 1949 (R. 961-962). Judgment enforcing the order was entered on August 5, 1949 (R. 937-946).

The Facts.

A. Background.

Each Company owns and operates certain vessels that sail upon the Great Lakes and tributary waters (R. 122-207, 242-243, 376), and have for the past several years been parties to collective bargaining agreements with the NMU (R. 125-127, 210-212, 245-246, 377-379, 603-613, 637-647, 648-655, 711-721). Since 1942 it had been the practice of Cleveland Tankers, Inc., Lake Tanker Corporation, and Great Lakes Transport Corporation to negotiate jointly with NMU and execute identical agreements (R. 154). On the other hand, Texas Company negotiated separately with the Union (R. 250-254). The 1947 agreements with the Companies contained identical termination clauses, and were to expire on January 19, 1948 (R. 613-614, 654).

Prior to 1938 the Companies hired seamen "off the dock", in "shape-ups", through boarding houses, saloons, and "crimp joints" whose owners were hiring masters who forced them to pay for their jobs; or through employment offices operated by employer associations (R. 237-238, 392, 481-484, 521-534, 545-555, 859-863).

Under the "shape-up", seamen who desired employment were obliged to gather in a group at the wharf where vessels needing personnel were docked. In most instances, those who bribed or were favorably known to the "shipping master" were selected for any berths that might be open. The remainder of the group would then move on to another wharf where the same general procedure was followed (R. 526-527, 529, 860). Seamen were also hired through boarding houses, saloons, and brothels which were fre-

quently owned by "hiring masters", who were engaged by shipping companies and were paid a stipulated fee for each seaman that was supplied. These establishments were frequently operated as "crimp joints" from which sailors were "shanghaied" while drunk, drugged, or overcome by force. Sailors were frequently caused, by means of theft or trickery, to lose all their money and then become dependent upon the proprietor for another job.

Another method which was frequently employed by "shipping masters" was to trick seamen into running up large debts that could only be paid by consigning their wages to the proprietor when signing shipping articles (R. 481-484, 525-534, 545-555, 859-863).

Seamen were also hired, but to a lesser extent, through employment offices operated by employers. Because of the cost in maintaining such offices, they were operated only by major companies (R. 237-238, 392, 861-862).

As a result of the indignities, discomforts, and abuses which seamen were caused to suffer under these unjust and inhuman practices, frequently reminiscent of a kind of slavery, the NMU, after a long and costly struggle during which many strikes were waged, established a system of rotary hiring which has become known in the maritime industry as the "hiring hall" (R. 486).

Cleveland Tankers, Inc., Lake Tankers Corporation, and Great Lakes Transport Corporation accepted the hiring hall in 1938; Texas Company agreed to it in 1947 (R. 149-150, 237-238, 245-246, 392, 648).

The agreement between NMU and the Companies expiring on January 19, 1948 contained the following provisions with respect to the hiring of unlicensed personnel (R. 125-127, 209-212, 249-250, 605, 638-639, 713, 720):

> "The Union agrees to furnish satisfactory men and the Company agrees that during the period that

this agreement is in effect all replacements shall be hired through the offices of the Union, as vacancies occur. The Company may reject such replacements, provided:

(a) The rejections are for valid reasons, and

(b) The Company states in writing to the officers of the Union the reasons for such rejections, and that the Union shall have the right to take up such rejections under the grievance machinery outlined in Subsections (3) and (4) of Section 7 and in Section 8 of Article I of this Agreement. When a rejection is made, the Union shall immediately supply a replacement. If the Union cannot furnish replacements by one (1) hour before sailing time, the Company shall have the right to obtain replacements wherever possible." (Article I, Sec. 2).

Article IX, Section 2 of the Agreement with each of the Companies also contained the following provision (R. 605, 639, 650, 713):

> "In fitting out and laying up vessels, when replacements are necessary, the Company will employ members of the Union; * * *, "

An addendum to the agreement with the Texas Company modified Article IX, Section 2 of the Agreement to provide that (R. 247):

> "In fitting out and laying up vessels, when replacements are necessary, the Company will obtain them as provided in Section 2 of Article I, except that the Company may obtain replacements wherever possible if the Union, in response to the Company's request for replacements, is unable to supply same within twenty-four (24) hours."

The NMU hiring hall practices, which were governed by the Union's Shipping Rules, were not referred to in the

1947 agreements; nor are they covered in existing agreements or made a part thereof. These rules provide that "Only members in good standing, as defined in the Constitution, may register to compete for a job." (R. 425, 848)

The manner in which the hiring halls involved in this case function under the Union's Shipping Rules may be briefly described as follows:

The unemployed seaman who has been longest without work is first to secure employment when a vacancy occurs. Employment is based upon priority of registration at the hall. Ship owners notify the hiring hall of the number of men needed in various ratings. The man at the head of the list for that particular line of work is sent to the representative of the company in question. Except that he has the opportunity of rejecting the first two offers of employment without losing his place on the list, he may not insist on shipping on any particular vessel or for any particular company. If he declines the third job offered him, his name is dropped to the bottom of the registration list. If the Union has not supplied a replacement within an hour before sailing time, the company may obtain the needed personnel from other sources (R. 473-478). Admittedly, members are given preference over non-members (R. 223, 425-427, 703, 847-856).

B. The 1948 Negotiations and the Resulting Unfair Labor Charges Against the NMU.

In the course of the 1948 collective bargaining negotiations between the NMU and the Companies, the Union and its agents demanded a retention of the hiring provisions which existed in the old agreements (R. 155-158, 163, 165-167, 251-252, 261, 263, 281-283, 293-295, 307, 317-319).

Despite the merits of continuing the union hiring by contract with the ship operators, a discordant note was struck

at the outset of these negotiations by reason of the operators' claim that the amended Act prohibited the same contract clauses as then in effect (R. 157-158, 173-174, 261, 263, 279-280, 283-284). The Union, on the other hand, argued that the provisions were lawful (*ibid.*). Negotiations proceeded at a slow and fruitless pace because of this barrier.

When the Union, through its members, authorized the strike against the Companies, the latter promptly filed unfair labor charges against the NMU and its agents, alleging violations of the Act. The NMU was then exposed to the speediest action any union ever received from the Board.[2]

Despite the NMU's request for an adjournment of the hearing on the ground that its officers were then occupied in proceedings before the Presidential Board of Inquiry in New York and impending injunction proceedings under Title II of the Act, as a result of which they had no adequate opportunity to prepare for trial, their request was summarily denied (R. 115-117). *In consequence, the hearing proceeded without the presence of the NMU or its counsel* (*ibid.*).

C. The Dispute is Settled.

On June 21, 1948, the NMU resolved its differences with the Texas Company, which, in effect, continued the old agreement until June 15, 1950. On October 16, 21, and November 1, 1948 the NMU concluded identical agreements with Lake Tankers Corporation, Great Lakes Transport Corporation, and Cleveland Tankers, Inc., respectively (R. 933-937). Significantly, *the employment clause in each*

[2] The charges were filed on May 27 and May 28, 1948; complaints issued on June 2, 1948; hearings were commenced on June 14, 1948; the intermediate report was issued on June 21, 1948, and was followed by the Board's decision on August 17, 1948.

of these agreements contained certain new provisions designed and intended to avoid even potential denial of the rights of non-union employees. Thus, the following language was added to the old agreements:

> "It is understood that nothing in this Agreement shall require the Company to discharge any unlicensed employee, now in its employ, *for non-membership in the Union,* and it is further understood that any employee, *regardless of union membership,* who is in one of the crews of the Company at the end of the lay-up period, may be recalled for service in the fleet during the following season; and *the Union will not require that such employee be a Union member as a condition precedent to his recall.*" (Italics supplied.)

Specification of Errors to be Urged.

The court erred:

1. In holding that a labor organization can be charged with a violation of Sec. 8(b)(2) of the Act in the absence of clear proof that a particular employee or group of employees suffered actual discrimination because of alleged non-union membership.

2. In holding that the National Maritime Union violated Sec. 8(b)(2) of the Act by insisting upon the retention of an employment clause which, though admittedly lawful on its face, might *nevertheless* tend to discriminate against unidentified employees or applicants for employment.

3. In holding that a labor organization which has demonstrated a real and sincere intention to conclude a collective

bargaining agreement can, nevertheless, be charged with a refusal to bargain in good faith, within the meaning of Sec. 8(b)(3) and Sec. 8(d) of the Act.

4. In failing to construe the Act in a manner which would effectuate its stated objectives.

5. In holding that the denial to petitioners of an opportunity to submit facts, arguments, and offers of settlement prior to the hearing, and the refusal of petitioners' request for a single adjournment did not constitute a violation of the Administrative Procedure Act and the Due Process Clause of the Constitution of the United States.

6. In holding that the Amended Act, as construed and applied by the Board, did not contravene the First, Fifth, and Thirteenth Amendments to the Constitution of the United States.

7. In enforcing the Board's order.

Reasons for Granting the Writ.

Except for the decision below, there has been no prior or subsequent judicial interpretation of Sec. 8(b)(2) of the Act which petitioners are claimed to have violated.

In substance, Sec. 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee *in violation of Subsection (a)(3)*.

Sec. 8(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee in regard to hire or tenure of employment because of membership or non-membership in a labor organization.

Significantly, there is no evidence that either an employee or applicant for employment with the companies named in this proceeding has filed an unfair labor charge with the Board or any of its regional offices, alleging discrimination in violation of Section 8 (a) (3) or Section 8 (b) (2) of the Act, either by petitioners or the companies or both. In fact the contrary is conceded (R. 933).

Since Section 8 (b) (2) is coextensive with Section 8 (b)(3), and since Section 8 (a) (3), so far as the instant case is concerned is the exact counterpart of Section 8 (3) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sects. 151, *et seq.*) (hereinafter called the "Wagner Act"), proper weight should attach to the decisions which construed this latter section. Petitioners have been unable to find a single decision which sustains the proposition of the court below that *potential discrimination* is sufficient by itself to warrant a finding of an unfair labor practice under Section 8 (3) of the Wagner Act.

If the present interpretation of Section 8 (b) (2) is permitted to stand, a double standard for employer and union conduct will, in effect, have been created. Section 8 (a) (3) will receive varying applications, depending upon whether the anticipated discrimination stems from an employer or a union. Certainly, in no case, has an employer who insisted under the Wagner Act, or who insists under the present Act upon maintaining an open shop with only potential denial of employment to union members, been found guilty of a violation of the old Section 8 (3) or the new Section 8 (a) (3).

If Section 8 (b) (2) of the present Act had made it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee *in violation of Subsection (a) (1)*, then the Board's decision and order might have had some validity.

However, since the plain language of the section refers to discrimination *in violation of Subsection (a) (3)*, only the test of discrimination thereunder can apply; namely, the denial of employment to *a specific employee* (see Point I of Brief at pp. 21-25, *infra*).

In the final analysis, the employment clauses sought to be retained by the NMU are lawful on their face (R. 8, 939). Nevertheless, by projecting past union practices into the anticipated future, which the Companies were not required by agreement to accept or be bound by, the court below sustained the Board's ruling that potential discrimination against unnamed individuals at some future time is violative of Section 8 (b) (2) of the Act.

To ignore the distinction between a contract provision valid on its face but which might unlawfully be enforced, and a contract provision invalid on its face, is to empower administrative agencies not only to probe the intentions and the mental operations of the parties which resulted in valid agreement, but to project prospective violations as inevitably destroying the capacity of the parties to contract.

Under such reasoning, no agreement however valid on its face is conceivable. Regardless of how both parties to a lawful contract may protest their intention not to violate the law, the Board may continue to invalidate agreements upon the speculation that illegal practices will necessarily flow from the operation by the parties of the valid agreement (see Point II of Brief at pp. 25-29, *infra*).

Also to be resolved for the first time, so far as petitioners can ascertain, is the question of whether a labor organization which has demonstrated a sincere desire to conclude a collective bargaining agreement, can, nevertheless, be found guilty of refusing to bargain within the meaning of Sections 8 (b) (3) and 8 (d) of the Act, merely because it insists

upon the inclusion of a provision which, though admittedly lawful on its face, may subsequently be unlawfully enforced.

Not only did petitioners seek to conclude an agreement, as the Board concedes (R. 17-18), but an agreement was finally consummated through the very medium which the Board in its order directs petitioners to employ (R. 933-935).

Even if it were to be assumed that the hiring hall provisions sought to be retained were, in fact, unlawful; that the Companies nevertheless voluntarily agreed to incorporate them into an agreement; and that no unfair labor charges were filed, would the Board then hold that either the Union or the Companies, merely by concluding such an "unlawful" agreement, refused to bargain in good faith? Clearly, the alleged statutory bar to continue the hiring hall is not self-executing. Obviously, no refusal to bargain can be found under such circumstances; regardless of the right to *recourse of an employer's alleged discrimination thereunder.*

It is indeed regrettable that the opinion of the court below is completely silent on this question (see Point III of Brief, pp. 30-33, *infra*).

Omitted also from the opinion of the lower court is any reference to the question of whether the Board is required to prosecute each unfair labor practice charge to its ultimate conclusion, regardless of its effect upon the stated objectives of the Act to achieve and maintain industrial peace. In this respect, the decision of the Court of Appeals appears to be contrary to the holding of this court in *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.* (303 U. S. 261) (see Point VI of Brief, pp. 42-44, *infra*).

Petitioners respectfully submit that the problems hereinabove discussed are of such great importance to the interpretation and administration of the Act as to require review by this Court.

Apart from the question of interpretation of the pertinent sections of a highly complex Federal Statute, not heretofore resolved by this court, the instant case as decided by the court below affects fundamental questions of Constitutional Law; first with respect to the conduct of the Board hearing, and second with respect to merchant seamen as a class.

Directing the lower court's attention to Sections 5 (a) and (b), 6 (a) and 10 (e) of the Administrative Procedure Act (Public Law 404, 79th Congress, Chapter 324, 2d Session, approved June 11, 1946), the NMU argued that by denying to them the opportunity to submit facts, arguments, and offers of settlement prior to the hearing, and by refusing to grant their request for adjournment (R. 114-117), the Board not only violated the Administrative Procedure Act, but also violated the Due Process Clause of the Constitution of the United States.

In dismissing these arguments, the court below referred to the stipulation which was entered into between counsel for the respective parties, that the testimony and evidence offered by the Union in *Matter of National Maritime Union of America et al. and Committee for Companies and Agents, Atlantic and Gulf Coasts Unlicensed Personnel,* Case No. 2 —C. B.—87[3] be incorporated by reference in the instant proceeding insofar as such testimony and evidence related to the basic issues of the employment clause (R. 111).

The decision below in this respect appears to be in conflict with the decision of the Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Prettyman,* 117 F. (2d) 786 (C. A. 6) where the board was criticized for conducting a hearing at a place inconvenient for the employer and removed from his witnesses, without providing time and opportunity to produce evidence to refute charges against it.

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[3] This case involved issues parallel with the instant proceeding.

The necessary premise of the court below is that since the union stipulated to incorporate certain testimony in another proceeding it was not prejudiced by the Trial Examiner's refusal to grant their request for adjournment. The error of the court lies in its failure to acknowledge that petitioners were denied a fair opportunity to cross-examine the Board's witnesses in this case. (See Point IV of Brief, pp. 33-36, *infra.*)

In disposing of petitioners' contention that the Amended Act as construed and applied, violates the First, Fifth, and Thirteenth Amendments to the Constitution of the United States, the court below refers to the very recent decisions of this court which sustain the constitutionality of state statutes *specifically designed to outlaw all forms of union security* (R. 945-946).[4] This view must necessarily have been predicated upon the theory that the state statutes so construed were identical or at least similar to the one involved in the instant case. In this regard, the Court of Appeals was in error.

Unlike the state legislators, Congress recognized that some form of union security was desirable and should, therefore, be retained (S. Rep. No. 105, on S. 1126, pp. 6, 7; Hearings before the Committee on Labor and Public Welfare, U. S. Senate, 80th Cong. 1st Sess. on S. 55 and S. J. Res. 22, Part 3, pp. 1323, 1333, 1378, 1399).

Therefore, instead of abolishing the proviso to Sec. 8 (3) of the Wagner Act,[5] Congress amended it to permit the making of union shop agreements under certain conditions, not here material, which would require employees to join the union on the thirtieth day following the date of hiring (Sec. 8 (a) (3) of the Amended Act).

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[4] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 355 U. S. 525; *A. F. L.* v. *American Sash Co.*, 335 U. S. 538.

[5] This guaranteed the closed shop.

While the union shop may be of considerable help to labor organizations representing workers in shore-side industries, it is of little practical value to a maritime union. In spite of the existence of a union shop agreement, a seaman willing to accept the benefits of union representation and of a union contract without the corresponding obligation of paying for any part of its costs could interminably pursue his calling without ever being required to join a union. This paradoxical situation is not as enigmatic as may appear on its face. Many voyages in the industry, particularly on passenger vessels, do not exceed thirty days (R. 495-496). With the termination of a voyage, a seaman is required by maritime law to sign off articles of employment. What a simple matter it would be for a seaman, particularly with the aid and encouragement of anti-union employers, to select voyages of relatively short duration, thereby avoiding the contractual requirement of joining a union within thirty days; nor can a seaman be prevented from terminating membership after a longer voyage. In no time, non-union elements could make such powerful inroads as to render impotent any effective union organization.

Thus, while Congress has preserved union security to workers in shore-side industries, it has effectively denied this protection to seamen, without whose labor marine commerce would cease and our National defense would be impaired. In this respect, the Amended Act, as construed by the court below, is arbitrary and prejudicial to a vital segment of the Nation's economy.

To say that the Board's order does not impose "involuntary servitude" within the meaning of the Thirteenth Amendment because it "does not prohibit any employee or group of employees from quitting their (sic) jobs or refusing to work even to accomplish an unlawful object"

(R. 946), is blindly to ignore the established and constitutionally protected concept that workers have the right to organize for their common protection and benefit.

The right to organize, however, is an empty phrase unless it can be enjoyed in effective terms. In a highly competitive economy, a worker who is faced with the alternative of quitting or accepting the conditions imposed upon him, regardless of how unsatisfactory or obnoxious they may be, is in no better position than a slave or a peon. Economic necessity compels him to surrender his self respect in order that he may sustain himself and his family regardless of the "intolerable" working conditions to which he may be exposed.

If, as the court below acknowledges, the Board's order does not prevent or prohibit individual employees or "groups of employees" from quitting their jobs or refusing to work in order to achieve their demands for a retention of the hiring hall, then the union which represents them should not be denied the right to direct all of its members to engage in a concerted effort to procure the same objective; otherwise, unions will have lost their effective force as collective bargaining representatives in a society that has long since acknowledged the social and economic necessity for their existence. Our courts have already recognized that the right to quit and to refuse to undertake work may as readily be exercised through a group organization as it can by an individual (*U. S.* v. *Petrillo*, 60 F. Supp. 845).[6]

Significantly, in *A. F. L.* v. *American Sash Co.*, 355 U. S. 538, 557, 558, the late Mr. Justice Rutledge, concurring with the majority of the court, stated:

> "• • • The right to prohibit contracts for union security is one thing. The right to force union mem-

[6] Although this case was reversed by 332 U. S. 1, the question of the constitutional right to quit work in concert was not at that time decided by this court.

bers to work with non-union members is entirely another. Because of this difference, I expressly reserve judgment upon the later question until it is squarely and inescapably presented. Although this reservation is not made expressly by the court, I do not understand its opinion to foreclose this question."

In commenting upon these remarks, the court below conceded that "This question may perhaps still be open" (R. 946). (See Point V of Brief, pp. 36-42, *infra*.)

Conclusion.

Because of the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 937-946) was rendered on July 1, 1949 and is reported at 175 F. 2d 686. The decree enforcing the order of the Board was made and entered on August 5, 1949 (R. 969). The findings of fact, conclusions of law, and order of the Board (R. 1-43) are reported at 78 N. L. R. B. No. 137.

Statutes Involved.

The statutes involved are:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. 1, Secs. 141, *et seq.*, and the Administrative Procedure Act, Public Law 404, 79th Congress, Chapter 324, 2d Sess., approved June 11, 1946).

The Board's order relates to alleged violations of Secs. 8 (b) (2) and 8 (a) (3) and (d) of the Amended Act. These sections as well as other relevant sections of the Amended Act, the Administrative Procedure Act and the Wagner Act are set forth in petitioners' Appendix below.

Reference is also made to the following provisions of the National Labor Relations Act (Wagner Act) (49 Stat. 429, 29 U. S. C. Secs. 151, *et seq.*):

Specification of Errors.

The Court of Appeals, in sustaining the order of the Board, erred in each and all of the respects referred to in the point headings below:

I.

It was error for the Court of Appeals to hold that a labor organization can be charged with violation of Section 8(b)(2) of the Act in the absence of clear proof that a particular employee or group of employees suffered discrimination because of non-union membership.

Section 8(b)(2) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

> "* * * to cause or attempt to cause an employer to discriminate against *an employee in violation of subsection (a)(3)* or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Italics supplied).

Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment * * * to encourage or discourage membership in any labor organization," with certain limitations not germane to this discussion.

The hiring provisions which petitioners sought to continue in the new agreements merely said that "all replacements shall be hired through the offices of the Union * * *; if the Union cannot furnish replacements by one hour before sailing time the Company shall have the right to obtain replacements wherever possible." (R. 5, 52-53, 73, 125-127,

209-212, 249-250, 605, 638-639, 713, 720). There is nothing in this clause which even remotely suggests the closed shop, which the Act specifically proscribes.

There is nothing in any of the agreements, past or present, which precludes an employer from permanently retaining non-union employees, who are commonly referred to as "trip carders" (R. 477-478, 703). In fact, the agreements which were executed subsequent to the issuance of the Board's order with Lake Tankers Corporation, Great Lakes Transport Corporation, and Cleveland Tankers, Inc. specifically guaranteed the tenure of employment of non-union members (R. 936).

In the final analysis the agreements contain certain employment clauses which both the Board and the court below found to be perfectly lawful on their face (R. 8, 939) but which, because of certain Union shipping rules which the Companies are not required by contract to accept or be bound by (R. 5, 7-8, 11, 14-15), *may* tend to discriminate against some one at some future time.

Contrasting the Board's interpretation of the parallel provisions of the Wagner Act [8 (3)] a curious anomaly is revealed. Under the Wagner Act, an employer's indicated refusal to hire union members may have been a violation of Section 8 (1). It was not, however, a violation of Section 8 (3) *in the absence of a specific refusal to employ a specific individual,* in a particular case for such cause.

In *N. L. R. B.* v. *Security Warehouse and Cold Storage Company,* 136 F. 2d, 829 (C. A. 9), the employer was held to have violated Section 8 (1) (Wagner Act) by employing college students in order to avoid hiring of union men. Thus, even though there was a patent intention to discriminate against union men in the hire and tenure of employ-

ment, there was no finding of a violation of Section 8 (3) since no named union employee or applicant had charged that he was denied employment because of membership in a union. To the same effect, see *Matter of Continental Oil Company,* 65 N. L. R. B. 1400 and *Reeves-Ely Laboratories, Inc.,* 76 N. L. R. B. No. 106 (1948).

Yet, here, under similar language of a corresponding provision of the Act, the Board and the Court below apply an entirely novel test and find a union's insistence upon what may be construed as preferential hiring of union members over non-union applicants to be a violation of Section 8 (b) (2) in the absence of a specific denial of employment in a particular case.

As a consequence, almost identical language receives varying applications, depending upon whether the anticipated discrimination stems from an employer or a union. The result is the emergence of a double standard without any logical justification therefor.

We can find no court decision which sustains the proposition of the court below that potential and not actual discrimination operates as such by itself for a finding of an unfair labor practice under Section 8 (a) (3).

Discrimination cannot occur in a vacuum. We contend, particularly in the light of the cases decided under the Wagner Act, that the only test of discrimination within the meaning of Section 8 (a) (3) is the consummation of an overt act against a *particular individual or group of individuals,* rather than the mere possibility or intention to commit an act of favoritism or discrimination which may or may not occur.

The language of the Act requires that there be actual discrimination against "an employee" before either Sections 8 (a) (3) or 8 (b) (2) can be said to have been violated.

In the words of Senator Taft, this subsection "is designed to protect *individual* employees from discrimination in employment * * *" (Rep. No. 105 of Senate Committee on Labor and Public Welfare—80th Cong. 1st Sess.). (Italics supplied.)

Yet there is not a shred of evidence in this case that the NMU has attempted to cause any of the Companies to discharge or in any manner discriminate against any particular person in regard to hire or tenure of employment (R. 933).

Section 8 (b) (2) is necessarily coextensive with Section 8 (a) (3). Both must be read together. Section 8 (a) (3) cannot possibly be so construed as to require an employer to seek out non-union men when jobs are available. To do so would be to discriminate against union members. It would therefore follow that discrimination against membership or non-membership in a union within the meaning of Section 8 (a) (3) can be determined *only* when it has been demonstrated that the employer's decision to hire or fire was motivated solely by union or non-union considerations. Petitioners are not aware of a single case under the Wagner Act which stands for the proposition that an employer has violated Section 8 (3), which is the counterpart of the present 8 (a) (3) by warning or threatening that he would not hire an applicant for employment, or that he would fire an employee, if he became a member of the union (*N. L. R. B.* v. *Security Warehouse and Cold Storage Company, Reeves-Ely Laboratories, Inc., supra*). Under such considerations, the employer would have been found guilty of interfering with the right of self-organization, in violation of Sections 7 and 8 (1) of the Wagner Act; but nothing more. If the same set of facts were to arise under the present Act, the employer would likewise be

charged with a violation of Sections 7 and 8 (a) (1). (Cf. *Shields Engineering and Manufacturing Co.*, 85 N. L. R. B. No. 31).

If Section 8 (b) (2) had made it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee *in violation of Subsection (a) (1)*, then the Board's decision and order might have had some validity. However, since the plain language of the section refers to discrimination *in violation of Subsection (a) (3)*, only the test of discrimination thereunder can apply; namely, the denial of employment to a *specific employee.*

II.

It was error for the court below to hold that the NMU violated Section 8 (b) (2) of the Act by insisting upon the retention of an employment clause which though legal on its face, might, under certain circumstances, discriminate against certain employees or applicants for employment.

In its decision the Board said:

> "The hiring hall provision in question does not on its face require that the Companies discriminate in favor of NMU members" (R. 8).

Thus, the constant position of the Companies that they could not agree to include the hiring hall provisions in the new agreement because, in their opinion, they were proscribed by the Taft-Hartley Act, was completely demonstrated to be incorrect. The Union's position, on the other hand, that the hiring clauses were not unlawful, has now been sustained by the court below, as well as by the Board (R. 17-18, 939).

The fundamental error of the Board, which the court below regretably followed, was in connecting past practices with the present and future. It was erroneously assumed that because certain employment practices had been followed in the past, the same practices would unalterably be continued in the future despite any change in the law. This assumption, even if well founded, would still remain a mere assumption in the absence of overt acts.

Since the hiring hall provisions were valid, any present finding of violation of the Act in the future must necessarily be based upon what is tantamount to mere speculation or surmise.

Since the employment clauses are concededly lawful on their face, there was and is no compulsion on the part of the Companies to violate the law in the future. However certain it may be that the Union would continue its former practices, remedial recourse is plentifully provided by the Act. The clear presumption is that both the Companies and the Union would comply with the law. If their conduct in the past was such that, if continued, violations of the law of the land would ensue, it is much more likely than otherwise, that the practices would be voluntarily amended or administratively repressed so as to bring about compliance. Certainly, compliance could then be enforced by charges filed by an aggrieved party based upon an actual case of discrimination.

Of course, if the Board had found that the hiring provisions were invalid on their face, then its conclusions and their affirmation by the lower court might have been justified. In such a case it would have inevitably followed that discrimination must result.

It is for the foregoing reasons, or substantially similar ones, that the courts have in a great variety of situations held that where a contract is valid on its face it would not

be presumed, however persuasive the likelihood, that an illegal or improper use would be made of some of the provisions of the contract. The courts have enforced such contracts in a variety of situations, despite the fact that under certain circumstances they might be put to an illegal use (53 A. L. R. 1364; 114 A. L. R. 370).

Thus, in 5 *Williston,* Contracts, page 4559, Sec. 1629 A (Rev. Ed. 1936), it is said:

> "The mere fact that a contract under some circumstances may result in an act contrary to public policy will not invalidate it where such consequences will not necessarily result from performance of the contract as *it will be presumed that the parties would conform to the law.*" (Italics supplied.)

In *Straight Side Basket Corporation* v. *Webster Basket Company,* 82 Fed. (2d) 245 (C. A. 2, 1936), in an action to recover patent royalties, the defense of invalidity of contract was overruled by the Court of Appeals for the Second Circuit in an opinion by Judge Chase, wherein he said, in part:

> "The point is that, as the agreement did not call for action by either party in violation of any law, the contract could be lawfully performed in full in accordance with its terms and so has to be taken to have embraced only lawful acts in absence of proof to the contrary. The presumption is in favor of validity in order that the right of freedom of contract may be maintained. *Steele* v. *Drummond,* 275 U. S. 199; *Hobbs* v. *McLean,* 117 U. S. 567; *Valdes* v. *Larrinaga,* 233 U. S. 705."

This doctrine was recently followed by the Court of Appeals for the State of New York in *Levinsohn Corp.* v. *Joint Board of Cloak, Suit, Skirt and Reefer Makers'*

Union, et al., (299 N. Y. 454, July 19, 1949), where the employers' application for an order staying the arbitration of alleged violations of a collective bargaining agreement was denied. The theory upon which the employers proceeded was that the agreement, which contained a closed shop provision, was unlawful because there was no proof that the affected employees constituted an appropriate bargaining unit as required by Section 9(a) of the Act. In overruling the employers' contentions, Judge Conway, speaking for the entire court, stated:

> "If any presumption is to be indulged in where a formal collective bargaining agreement has been entered into, it is the ordinary presumption of legality * * *."
>
> * * * * * *
>
> "Here there is no allegation that any employees enrolled in Amalgamated have been discharged, nor that their discharge has been requested, nor that Amalgamated is the selected representative of the employees as bargaining agent in an appropriate unit designated by National Labor Relations Board * * *."

In short, the authorities ineluctably demonstrate that illegality will not be presumed; rather, that legality will be presumed. Particularly where grave economic upheavals may result from a disturbance of the status quo is there an absolute necessity for demonstrating violations of legality.

In the case at Bar there is no experience of illegality or violation under the new agreement. The Board and the court below erroneously related past experiences and operations and employment conditions to the future and concluded that violations would arise in the future under the new collective bargaining agreement. It was also assumed

that both the Companies and the Union would violate their duty to comply with rather than to avoid running afoul of the law. Instead of presuming compliance with the law, the opposite was hypothesized. There were and are no complaints of discrimination by any individual or group of individuals either actual or threatened; yet the Board and the court below arbitrarily assumed such discrimination. These conclusions based on anticipated consequences are wholly without judicial precedent. All the Wagner Act cases are distinctly contrary, as are indeed basic and fundamental concepts of all law.

This court has unmistakably warned against the error that, we submit, the Board and the Court below committed in this case, of summarily attempting to dispose of a complicated state of facts. In *Kennedy* v. *Silas Mason Company,* 334 U. S. 258 (1948), this court vacated summary judgment for defendant because it did not believe that any "conclusion in such a case should prudently be rested on an indefinite factual foundation." It went on to say:

> "'* * * summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

III.

It was error for the Court of Appeals to hold that the N. M. U., which had demonstrated a real and sincere intention to conclude a collective bargaining agreement could nevertheless be charged with a refusal to bargain in good faith within the meaning of Sections 8(b)(3) and (d) of the Act.

It is indeed difficult to understand the Board's conclusions that notwithstanding the N. M. U.'s sincere desire to conclude an agreement (R. 17-18), particularly since the employment provisions sought to be included were not unlawful, amounted to a refusal to bargain in good faith. If anything, the Union's consistent position that the hiring hall was not unlawful has been sustained by the Board as well as by the court below (R. 939).

As has already been indicated, the fundamental error of the Board, which the Court of Appeals followed was to project past practices into the future (see Point II, *supra*).

But even if it were to be assumed that the past employment practices as prescribed by the Union's shipping rules would be unlawful under the present Act and that the employers would be obliged to subscribe to these practices in the future, even though not required by contract to do so, we do not believe that a demand for an unlawful objective *per se* amounts to a refusal to bargain.

While this view was raised by the Union and argued by counsel, the Court of Appeals has regretably refrained from discussing the question, which so far as we can determine had not at that time been squarely presented to the courts.[1]

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[1] So far as petitioners can determine, this question was answered for the first time by the Court of Appeals for the Fifth Circuit in *N. L. R. B.* v. *Corsicana Cotton Mills* on August 16, 1949. (Unreported to date; but appearing in 24 L. R. R. M. 2494.). For discussion of this case see page 33, *infra*.

The cases cited by the Board merely hold that it is the statutory duty of employers to deal with the majority representative as the exclusive bargaining agent for all employees in the appropriate unit.[2] Those cases involved an insistence by the employer to recognize the majority union as representatives of its members only. They deal with the totality of the obligations imposed by Section 8(5) of the Wagner Act which combines (1) the duty to bargain collectively (2) with the majority representative and (3) on behalf of all the employees.[3] For example, an employer that bargains in the best of faith with X union violates the law if the Y union is the majority representative.

The other cases cited by the Board merely hold that an unlawful demand by an employer whose *anti-unionism* had already been established by other acts may be used as further evidence of a determination not to reach an agreement.[4]

But where, as here, the primary and unremitting objective of the Union was to conclude an agreement, it was error for the Board and the court below to conclude that there was a refusal to bargain in good faith. If the Board's reasoning, which was apparently sustained by the lower court is permitted to stand, then an honest but inaccurate opinion might expose an employer or a union to an unfair labor charge.

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[2] *Hartsell Mills Co.* v. *N. L. R. B.*, 111 F. (2d) 291, 292 (C. A. 4); *Matter of Golden Turkey Mining Co.*, 34 N. L. R. B. 760; *May Dept. Stores Co.* v. *N. L. R. B.*, 326 U. S. 371.

[3] Section 8(a)(5) of the Amended Act imposes corresponding duties upon an employer.

[4] *N. L. R. B.* v. *Winona Textile Mills*, 160 F. (2d) 201 (C. A. 8); *N. L. R. B.* v. *Reed & Prince Manufacturing Co.*, 118 F. (2d) 874, (C. A. 1); *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. (2d) 849, 853 (C. A. 7); cert. denied 312 U. S. 680; *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. (2d) 32, 38 (C. A. 3).

Significantly, the Board found that the N. M. U. never receded from its position that the employment practices were not proscribed by the Act (R. 17-18).

As recently as August 16, 1949, the Court of Appeals for the Fifth Circuit in *N. L. R. B.* v. *Corsicana Cotton Mills* (*supra*) was confronted with a similar situation. In that case the court properly held that an employer who insisted upon a clause which would give non-union members of the union the right to vote on acceptance of a contract was not in contempt of a prior judicial decree directing him to bargain in good faith because his insistence was motivated by a sincere belief that he was legally justified in making such demand. The fact that the belief was mistaken did not indicate that he wilfully disobeyed its prior decree. In this connection the Court stated:

> "In short, we are in no doubt that if the provisions of our decree have been disobeyed or violated, such violation was not intended but has resulted from a mistaken view of what was permitted to the company under the law and not from a purpose to violate the law or our decree."

Assume, *arguendo*, that the hiring provisions in the 1947 contracts, although unlawful were voluntarily agreed to by the companies in the 1948 agreements and that no unfair labor charges were filed, as here. Would the Board then hold that either the Union or the companies, merely by concluding such an unlawful agreement, refused to bargain in good faith? Clearly, the alleged statutory bar to continue the hiring hall is not self-executing.[5] The express language in Section 8(d) which defines collective bargaining as "the

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[5] In *N. L. R. B.* v. *Prettyman*, 117 F. (2d) 786 (C. A. 6), the Court stated that: " * * * the Board is not empowered to initiate proceedings on its own motion but must first await the filing of charges."

execution of a written contract incorporating *any agreement reached if requested by either party,* * * *" makes it obvious that no refusal to bargain can be found under such circumstances; regardless of the right to *recourse of an employee-alleged discrimination thereunder.*

Since the only test of bargaining in good faith is the *sincere desire to conclude an agreement,* and since the Board has conceded that the NMU never receded from that objective (R. 17-18), whatever section of the law may have been violated, if any, by petitioners' insistence upon the hiring hall, they cannot be charged with a violation of Section 8(b)(3) and 8(d) of the Act.

IV.

It was error for the Court of Appeals to hold that the denial to petitioners of an opportunity to submit facts, argument and offers of settlement prior to the hearing; and the refusal of a request for a single adjournment did not constitute a violation of the Administrative Procedure Act and the due process clause of the Constitution.

By its provisions, the Administrative Procedure Act was designed not only to unify administrative procedure for Government agencies, but also to incorporate the tests of due process. Thus, Section 5(b) imposes a requirement that prior to an administrative hearing an "agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and (2) to the extent that the parties are enabled so to

determine any controversy by consent, hearing and decision upon notice and in conformity with Sections 7 and 8".

An affirmative duty is thereby enunciated with which the Board must establish compliance as a pre-condition to proceeding with hearing. No such opportunity appears from the record to have been granted petitioners. While it is true that this requirement is to be invoked only "where time, the nature of the proceeding, and the public interest permit" (*Ibid.*), no emergency existed at the time of the hearing. On June 14, 1948, the very date on which the Board hearing commenced, the Government, under Title II of the Act (Secs. 206 and 208), obtained an eighty day injunction against the Union (R. 933-934). No objective condition, therefore, compelled the Board summarily to proceed in disregard of the express requirements of Section 5(b) (*supra*).

The denial of due process was further compounded by the arbitrary refusal of the Board to comply with Section 5(a) of the Administrative Procedure Act in refusing the Union's request for a reasonable adjournment of the hearing (R. 115-117). No reason accompanied the denial. Section 5(a) (*Ibid.*) provides in part:

> "• • • due regard shall be had for convenience and necessity of the parties or their representative in fixing the time and place for hearing."

Petitioners respectfully submit that the Board in denying their request for a reasonable adjournment, acted arbitrarily and unlawfully, in complete disregard of its own past practices, rules and regulations and the requirements of the Administrative Procedure Act. Petitioners were deprived of a full and fair hearing and of their Constitutional right to due process of law. *Morgan* v. *United States*,

298 U. S. 468; *Morgan* v. *United States,* 304 U. S. 1; *Market Street R. Co.* v. *Commission,* 324 U. S. 548; *Ohio Bell Tel. Co.* v. *Commission,* 301 U. S. 292; *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

Under circumstances even less reprehensible the Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Prettyman* (*supra*) refused to enforce an order of the Board on the ground that a fair hearing had been denied an employer under the Wagner Act. In that case the Board was criticized for conducting a hearing at a place inconvenient for the employer and remote from his witnesses without providing time and opportunity to produce evidence to refute charges against it. The Court also held that Section 5 of the Act (Wagner Act) did not vest the Board with uncontrolled discretion in the conduct of its hearings.

The necessary premise of the court below is that since petitioners stipulated to incorporate certain testimony of another proceeding they were not prejudiced by the Board's refusal to grant their request for an adjournment. The error of the Court lies in its failure to acknowledge that petitioners were denied a fair opportunity to cross-examine the Board's witnesses in this case and no specified or general waiver of this right occurred.

Citing *Ohio Bell Telephone Co.* v. *Public Utilities Commission* (*supra*) the Court of Appeals in the *Prettyman* case stated:

> *"Even if the order of the Board were justified by the facts, which we are not here deciding; the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law; otherwise, the Board could enter orders without a hearing."* (Italics supplied.)

V.

The court erred in holding that the Act as construed and applied by the Board did not contravene the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

Long before any labor legislation had been enacted in this country, our courts affirmed that the right of workers to organize for their common protection and benefit is constitutionally protected. *Gompers* v. *Buck Stove & Range Company,* 221 U. S. 418; *Bayonne T. Corp.* v. *American Fed. of Silk Workers,* 172 A. 551 (N. J.), 92 A. L. R. 1450. This right was reaffirmed by Congress in the Wagner Act and found further judicial expression in *N. L. R. B.* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1. The present Act re-states this principle, if not in spirit, at least in substance (Title I, Section 1).

The right to organize, however is an empty phrase unless it can be enjoyed in effective terms. The N. M. U., expressing the wishes of its members, had fixed as one of the conditions of employment that seamen be obtained from its hiring halls. Since job seeking is a need which constantly occurs in the industry (R. 475, 476, 859), it assumes a special importance to seamen. Should they be compelled to find work in a manner dictated by their employer, seamen would necessarily be required to surrender the right to dictate the terms upon which they will work and to withhold their services unless satisfied. In consequence, an anomalous result would follow. The right to make contracts for the sale of one's own labor, which the Fifth Amendment guarantees, would be forcibly removed from the area of collective bargaining.

It is impossible to keep a seaman forever on board his ship. Eventually he must leave for rest, for recreation, and to join his family. Cf. *Aguilar* v. *Standard Oil Company,* 318 U. S. 724. Unless he can have some assurance of reemployment within a reasonable period of time on a fair and equitable system of rotary hiring, economic necessity will outweigh essential physical, psychological, and social requirements and will compel him to remain on board his ship with resultant impairment of health and morale. The ship owner is left free to destroy effective union organization. Cf. *Scopes* v. *Helmar,* 205 Ind. 596, 601; *Interborough Rapid Transit Co.* v. *Lavin,* 247 N. Y. 65; *Goldfinger* v. *Feintuch,* 276 N. Y. 281. See also: 43 Columbia Law Rev. 42.

In disposing of petitioners' contention that the Act as construed and applied violates the First, Fifth and Thirteenth Amendments of the Constitution, the court below refers to the very recent decisions of this Court which sustain the constitutionality of State statutes specifically designed to outlaw *all forms* of union security (R. 945-946).[6]

This view must necessarily have been predicated upon the theory that the *State* statutes so construed were identical or at least similar to the one which is involved in the instant case. In this regard, the Court of Appeals was in error.

Unlike the State legislatures, the Congress recognized that some form of union security was desirable and should therefore be retained (S. Rep. No. 105, on S. 1126, pp. 6, 7; Hearing before the Committee on Labor and Public Welfare, U. S. Senate, 80th Cong., 1st Sess.; on S. 55 and S. J. Res.

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[6] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525; *A. F. of L.* v. *American Sash & Door Co.,* 335 U. S. 538.

22, Part 3, pp. 1323, 1333, 1378, 1399). Therefore, instead of abolishing the proviso to Section 8(3) of the Wagner Act.[7] Congress amended it to permit the making of union shop provisions under conditions not here material, which would require new employees to join the union on the 30th day following the date of hiring (Section 8(a)(3) of the present Act).

But due process requires that the law shall not be unreasonably arbitrary or capricious, and that the *means selected shall have real and substantial relation to the objective sought to be obtained. Nebbia* v. *New York,* 291 U. S. 502; *Biddle Purchasing Co.* v. *Federal Trade Commission,* 96 F. (2d) 687, cert. denied, 305 U. S. 634; *West Coast Hotel Co.* v. *Parrish,* 57 S. Ct. 578.

While the Union Shop may be of considerable help to labor organizations representing workers in shore-side industries, it is of little practical value to a maritime union. In spite of the existence of a union shop agreement, a seaman, willing to accept the benefits of union representation and of a union contract without the corresponding obligation of paying for any part of its cost, could pursue his calling until Kingdom Come without ever being required to join a union. This paradoxical situation is not as enigmatic as may appear on its face. Many voyages in the industry, particularly on passenger vessels, do not exceed thirty days (R. 495-496). With the termination of a voyage a seaman is required by Maritime Law to sign off articles of employment. What a simple matter it would be for a seaman, particularly with the aid and encouragement of anti-union employers to select voyages of relatively short duration, thereby avoiding the contractual requirement of joining a union within thirty days; nor can a seaman be prevented

[7] This guaranteed the closed shop.

from terminating membership after a longer voyage. In no time, non-union elements could make such powerful inroads as to render impotent any effective union organization.

Thus, while Congress has preserved union security to workers in shore-side industries, it has effectively denied this protection to seamen, without whose labor marine commerce would cease and our national defense would be impaired. In this respect, the Act as interpreted by the Board and the court below, is arbitrary and prejudicial to a vital segment of the nation's economy.

The purpose of the Act is to regulate interstate commerce by preserving it free from interruption of labor disputes. Practically every labor dispute in the maritime industry has been waged over the "hiring hall". By denying to seamen the right to discuss and bargain over the method of their employment in the same effective manner as is now guaranteed shore-side workers, Congress has selected implementing means which may very well invite renewed industrial strife in a vital segment of our economy (Cf. *Nebbia* v. *New York, supra*).

Emphatically, this argument is not addressed to the wisdom of the legislature. Rather, it is addressed to the following observations of the court below:

> "* * * Sometimes, to be sure, the nature of a statute is such that impliedly it delegates to the courts, in interpreting it, the power and duty to round out the legislative legislation by judicial legislation which involves consideration of social policy." (R. 941-942).

In holding that there was no room in this case for judicial "law-making" because of the clear legislative purpose of the Act; the Court erred not only in failing to find that the means selected by Congress had no real and sub-

stantial relation to the objective sought to be obtained; but also erroneously overlooked the economic and social significance of the problem.

Since job-seeking is a real need which constantly recurs in the Maritime Industry (R. 475-476, 859), it assumes especial importance to seamen. Instead of submitting themselves to the indignities of job hunting at various assortments of "crimp joints", piers, docks, and company offices; instead of bribing ships' officers; instead of competing with hundreds of holders of forged sea papers (R. 237-238, 392, 859-863, 481-484, 521-534, 545-555), seamen, through their Union, demanded that they be hired through their own organizations, which had devised an equitable system of rotary hiring (see page 6, *supra*). Should they be compelled to find work in the manner dictated by their employer, seamen would necessarily be compelled to surrender the right to bargain for the terms and conditions under which they will work and to withhold their services unless satisfied. In consequence, an anomalous result would follow. The right to make contracts for the sale of one's own labor, which the Fifth Amendment guarantees, would be forcibly removed from the area of collective bargaining.

To say that the Board's order does not impose "involuntary servitude" within the meaning of the Thirteenth Amendment because it "does not prohibit any employee or group of employees from quitting their (*sic.*) jobs or refusing to work even to accomplish an unlawful object" (R. 946) is blindly to ignore the established and constitutionally protected concept that workers have the right to organize for their common protection and benefit. *Gompers* v. *Buck Stove & Range Company; Bayonne T. Corp.* v. *American Federation of Silk Workers* (*supra*).

In a highly competitive economy a worker who is faced with the alternative of quitting or accepting the conditions

imposed upon him regardless of how unsatisfactory or obnoxious they may be, is in no better position than a slave or peon. Economic necessity compels him to surrender his self-respect in order that he may sustain himself or his family regardless of the intolerable working conditions to which he may be exposed. Cf. *N. L. R. B.* v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1.

If, as the Court below acknowledges, the Board's order does not prevent or prohibit individual employees or groups of employees from quitting their jobs or refusing to work in order to achieve their demands for a retention of the hiring hall, then the union which represents them should not be denied the right to direct all of its members to engage in a concerted effort to pursue the same objective. The freedom to quit and refuse to undertake work may as readily be exercised through a group organization as it can by an individual. *U. S.* v. *Petrillo,* 68 F. Supp. 845.[8]

Significantly, in *A. F. of L.* v. *American Sash & Door Co.,* (*supra*) the late Mr. Justice Rutledge, concurring with the majority of the Court, stated:

> "* * * the right to prohibit contracts for union security is one thing. The right to force union members to work with non-union members is entirely another. Because of this difference, I expressly reserve judgment upon the latter question until it is squarely and inescapably presented. Although this reservation is not made expressly by the Court, I do not understand its opinion to foreclose this question."

In commenting upon these remarks the Court below conceded that "this question may perhaps still be open" (R. 946).

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[8] Although this case was reversed by 332 U. S. 1, the question of the Constitutional right to quit work in concert was not decided.

VI.

The Board's order is inconsistent with the stated purposes of the Act. Hence it was error for the Court below to grant enforcement.

By completely ignoring the distinct differences between hiring practices in the maritime industry as contrasted with those ashore, the Board and the Court below proceeded to consider the problem in the abstract, and without relating it to the express purposes of the Act. Its clearly stated object, as particularized by Section 1, is to remove "certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

The Wagner Act and the present law clearly disclose that the Board is not required to pursue each case to an ultimate conclusion where the result to be obtained does not effectuate the purposes of the Act. This view is underscored by the fact that, so far as this argument is concerned, the present Section 10(e) is not materially changed from Section 10(c) of the Wagner Act. While the Court below made no answer to petitioners' observations in this regard, this Court, recognizing its importance specifically dealt with the relation between the administration of Section 10 of the Wagner Act by the Board and the objects which the Act sought to obtain. Thus, in *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, Mr. Justice Stone for the Court declared:

> "Notwithstanding the mandatory form of Section 10(c), its provisions in substance leave to the

> Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered. Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy."

Significantly, the companies, who initially stirred the Board into action by filing charges, finally reached agreement with the Union (R. 933-937). No controversy survived. No longer was industrial strife threatened as a result of the differences between the Union and the employers. A quietus followed this purported threat to the National Welfare which a Maritime strike might have entailed.

Rotary hiring through Union halls was formulated to correct the evils inherent in the earlier hiring through "crimps", "finks" and the like. The present method gives dignity as well as protection to seamen seeking employment. It is inconceivable that any responsible authority would lend itself either directly or otherwise, to the possibility of turning the clock backwards. For the seamen, acutely aware of former employment conditions, the present system represents the departure from the personal degradation to which he was exposed until the advent of the hiring hall. No individuals are heard to complain (R. 933). The public interest and the objectives of the Act are served by the maintenance of the *status quo* rather than its disturbance. Otherwise, fulfillment of the legislative purpose will have been defeated through erroneous application of its implementing provisions.

The prevention of an unfair labor practice is a facet of the over-all design and not an end within itself. To the extent, therefore, that the prevention of a purported unfair labor practice would conflict with the objectives of the Act, the Board was obliged, in the exercise of its discretion to refrain from conflicting with the broad Congressional purposes. Otherwise, preoccupation with the machinery of achieving industrial peace as an end in and of itself has the contrary effect to that sought to be achieved by the Act, so as to defeat rather than realize its purposes.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari be granted.

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Appendix.

The relevant provisions of the National Labor Relations Act (Wagner Act) (49 Stat. 449, 29 U.S.C., Secs. 151, et seq.) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, Secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or

if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modifi-

cation or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, Secs. 346 and 347).

The relevant provisions of the National Labor Relations Act as amended, 1947 (Taft-Hartley Act) are as follows:

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated or some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

SEC. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—* * *.

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or to make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several states or with foreign nations, or engaged in the production of

goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 208(a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the Court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

The relevant provisions of the Administrative Procedure Act Public Law 404, 79th Congress, Chapter 324, 2nd Session, approved June 11, 1946, are as follows:

SEC. 5 (a) NOTICE—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, the nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permits, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with Sections 7 and 8.

SEC. 6 (a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency

function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

SEC. 7—In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided by this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section (7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be

certified to it for intial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for intial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the records that due and timely execution of its function imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10 (e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.